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90-1154

NUMBER _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1991

LOUIS JAMES SCOTT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael Louis Minns
Counsel of Record
MICHAEL LOUIS MINNS, P.L.C.
ATTORNEYS FOR PETITIONER
10200 Old Katy Road
Suite 101
Houston, Texas 77043
(713) 461-5471

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QUESTIONS PRESENTED

1. May a Federal District Court grant a judgment in favor of the Internal Revenue Service that exceeds the maximum amount contemplated by law? Is this an unconstitutional violation of Fifth Amendment due process?

2. May a Circuit Court, after sustaining a judgment in excess of the maximum amount allowed by law, decree that the judgment will be modifiable and reviewed by an executive administrative agency? Is this violation of the separation of powers clause of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Louis James Scott (Scott), respectfully requests that a Writ of Certiorari issue to review the judgment of the Fifth Circuit Court of Appeals entered on September 10, 1990.

OPINION BELOW

The opinion of the United States

Court of Appeals, Fifth Circuit, is reported under McCray v. U.S., 910 F.2d 1289 and is reprinted in the Appendix at pages 1 through 10.

A request for re-hearing by the Fifth Circuit was denied on October 19, 1990 and is reprinted in the Appendix at pages 11 and 12.

The decision of the Trial Court was not reported. It is reprinted in the Appendix at pages 13 and 14.

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this Appeal from the Civil Judgment affirmed by the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

DUE PROCESS

Amendment 5:

No person shall . . ., **(nor) be deprived of** life, liberty, or **property, without due process of law**; nor shall private property be taken for public use without just compensation.

SEPARATION OF POWERS

Article I, Section 1, -- "All legislative powers shall be vested in a congress . . ."

Article I, Section 8, "The Congress shall have the power to lay and collect taxes . . ."

Article III, Section 2, "The judicial power shall extend . . . to controversies to which the United States shall be a party . . ."

STATUTES INVOLVED

26 U.S.C. 6672: Failure to Collect and Pay Over Tax, or Attempt to Evade or Defeat Tax.

(a) General rule.--Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(b) Extension of period of collection where bond is filed.--

(1) In general.--If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person--

(A) pays an amount which is not less than the minimum amount required to commence a proceeding in court with respect to his liability for such penalty,

(B) files a claim for refund of the amount so paid, and

(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such

proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(2) Suit must be brought to determine liability for penalty.--If, within 30 days after the day on which his claim for refund with respect to any penalty under subsection (a) is denied, the person described in paragraph (1) fails to begin a proceeding in the appropriate United States district court (or in the Court of Claims) for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the 30-day period referred to in this paragraph.

(3) Bond.--The bond referred to in paragraph (1) shall be in such form and with such sureties as the Secretary may by regulations prescribe and shall be in

an amount equal to 1-1/2 times the amount of excess of the penalty assessed over the payment described in paragraph (1).

(4) Suspension of running of period of limitations on collection.--The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

(5) Jeopardy collection.--If the Secretary makes a finding that the collection of the penalty is in jeopardy, nothing in this subsection shall prevent the immediate collection of such penalty.

26 U.S.C. 3402: Income Tax Collected at Source.

(a) Requirement of withholding.--

(1) In general.--Except as

otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. . . . (Balance in statute inapplicable.)

26 U.S.C. 7501: Liability for Taxes Withheld or Collected.

— (a) General rule.--Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes

from which such fund arose.

STATEMENT OF THE CASE

A. BRIEF RESTATEMENT OF ISSUE.

Most personal income taxes are collected at the source by employers [26 U.S.C. 3402(a)]. The employer deducts a portion of the income, generally referred to as withholding, from the employee's wages and forwards the "withholding" to the Treasury. (See 26 U.S.C. 3402.) Under 26 U.S.C. 6672 certain agents of the employer are required to collect and tender these funds. They are collected in a trust capacity (26 U.S.C. 7501). A responsible party who fails to collect and tender trust funds under 26 U.S.C. 6672 may be assessed a 100% penalty jointly with all other responsible parties. It is this penalty and the application of the penalty with which we

are concerned.

For purposes of this Petition, a tax debt by the employer and the position as a responsible party by the Petitioner is conceded[1].

The question remaining is whether the Trial Court exceeded its authority when it rendered a judgment in excess of the statutory 100% penalty and left it to administrative department of the Executive Branch to straighten out the math. Essentially, the court amended the statute enabling the IRS to collect funds in excess of the statue.

B. COURSE OF PROCEEDINGS IN THE DISTRICT COURT.

Shannon Advertising, Inc., (Shannon)

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[1]On Appeal to the Fifth Circuit and in District Court, the Petitioner disputed the claim that he was a responsible party. This position is now abandoned because Petitioner does not feel the Supreme Court is likely to consider it.

as an employer, was charged with failure to pay trust funds over to the IRS.

Shannon had a duty to collect the funds at their source from its employees, put them in a trust fund, and then tender the sums to the government.

The IRS, in its effort to collect these funds, found that Michael McCray (the president), and Andrew J. Martin, Leonard Raines (Raines), and the Petitioner, Louis James Scott (three vice presidents), were responsible parties who willfully failed to tender these funds to the IRS Pursuant to 26 U.S.C. 6672. The IRS assessed each of them with a 100% penalty for the first quarter of 1982 in the amount of EIGHTEEN THOUSAND, SEVEN HUNDRED SIXTY-TWO and 40/100 DOLLARS ($18,762.40); and the three vice presidents for the two additional quarter periods in the amounts of TWENTY-FOUR

THOUSAND, TWENTY-FOUR and 54/100 DOLLARS ($24,024.54) [or TWENTY-THREE THOUSAND, ONE HUNDRED SIXTY-FOUR and 85/100 DOLLARS ($23,164.85)], and FOURTEEN THOUSAND, FIVE HUNDRED EIGHTY-FOUR and 14/100 DOLLARS ($14,584.14).

This cause of action was originally a suit for refund by Michael J. McCray against the United States of America. McCray paid SEVEN HUNDRED FIFTY DOLLARS ($750.00) to invoke the jurisdiction of the District Court to sue for a refund[2].

The United States filed a counter-

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[2]Part of the Fifth Circuit's rationale for not giving credit to Scott for $750.00 paid by McCray is that a suit for a refund could still be filed. Since this <u>was</u> a suit for a refund by McCray and it was adjudicated against McCray, there is clearly no foundation for this ruling.

Under 6672(b)(2) the time for any other suits for refunds by any other parties had passed. Regardless, since they were joined in this suit the issue suggested by the circuit court was moot.

claim against McCray and added the three vice presidents in as additional Defendants.

Before trial, all parties, except for Petitioner Scott and Co-Defendant Raines, entered into agreed judgments.

A Motion for Summary Judgment was filed by the United States against Raines and Scott. Raines did not file a response. Scott did.

The Court granted summary judgment against Raines and Scott for the full amount requested by the Government, less SEVEN THOUSAND, TWO HUNDRED EIGHTY-SIX and 77/100 DOLLARS ($7,286.77).[3]

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[3]McCray paid SEVEN HUNDRED FIFTY DOLLARS ($750.00) total. Scott paid SEVEN THOUSAND, TWO HUNDRED EIGHTY-SIX and 77/100 DOLLARS (7,286.77) total. Martin paid THREE THOUSAND, SIX HUNDRED SEVENTY-NINE DOLLARS ($3,679.00). Raines paid nothing ($--0--). Scott paid almost twice as much as his three Co-Defendants together.

Scott was not given credit for the SEVEN HUNDRED FIFTY DOLLARS ($750.00) reduction made in the first quarter by McCray or the THREE THOUSAND, SIX HUNDRED SEVENTY-NINE DOLLARS ($3,679.00) collected from Martin. Judgment was thus entered for more than the claim of the United States.

Shannon Advertising, Inc., herein also called "Agency", as defined under the withholding system mandated by 26 U.S.C. 3401 et seq., had a duty to collect income taxes and social security taxes from its employees and deposit the funds in a special fund for the benefit of the United States pursuant to 26 U.S.C. 7501.

For purposes of the case at bar, the amount of the tax due is not important, only the credit which should diminish the tax obligation.

It is conceded that whether or not a tax was collected, the Agency had a duty to collect it, that the Agency also had a duty to pay it, and that the taxes due for the payroll taxes for the first three quarters of 1982 due from Shannon were not paid.

The question is whether or not the court had the authority to order an excess be paid.

C. OPINION OF THE FIFTH CIRCUIT.

The Fifth Circuit acknowledged that the IRS had collected funds and not given Scott Credit for the funds (McCray v. U.S. at 6004). Nevertheless, the Appellate Court states in its opinion the position of the IRS as "The IRS argues that in this case the possibility existed at the time of Judgment that the owners who had paid portions of the amount due might sue for a refund[4]."

(McCray v. U.S. at 6004). In fact, the record impeaches this and the Circuit Court observes that: "The United States is no longer in danger of losing its right to collect the full amount due . . ."[4] but ". . . Scott can secure an administrative adjustment for any amount finally paid by joint debtors plus the proper interest credit." (McCray v. U.S. at 6005.)

Finally, the Appellate Court concludes that; "The judgment of the district court against Scott is affirmed without prejudice to the pursuit of Scott of the administrative remedies the

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[4]The Court acknowledges this. (See McCray at 6005) and Supra.) The record shows that at the time of Trial, all parties and payments relevant were joined to this action and all rights and obligations were adjudicated.

There was never a time during this litigation where the danger of a refund suit by parties other than McCray was possible.

IRS assures us are available . . ."

D. SUMMARY.

There is no administrative remedy for challenging a final unappealable Federal Court Judgment.

With all parties joined in the trial, there was no theory under law or equity by which any party could have post-judgment asked for a refund. The ruling of the Fifth Circuit implies that a need exists for flexibility to collect unspecified funds, but gives no reason except that by implication in some situations a potential refund may be involved. The circuit opinion acknowledges there is no such possibility in the case at bar. The Court accepts the IRS position that unjustly collected funds may be returned and that an administrative procedure exists, somewhere, to allow this. The opinion

does not describe the alleged post-final-judgment remedy . . . nor can it. None exists.

Typically when a judgment is rendered for a sum certain in dollars, it is reduced by the payment of that sum certain. It is a simple mathematical function supervised by the Courts. In this case, the Court has directed Scott to seek a non-existent administrative remedy to reduce the judgment against him, thereby acknowledging the judgment is too high. The Court has thus transferred part of its judicial responsibility and power to Scott's adversary in this matter, the IRS, and has admittedly ordered him to pay more than he owes.

REASONS FOR GRANTING THE PETITION

QUESTION ONE: The Trial Court held that Louis James Scott was liable for

EIGHTEEN THOUSAND, SEVEN HUNDRED SIXTY-TWO and 40/100 DOLLARS ($18,762.40) for the first quarter of 1982, even though SEVEN HUNDRED FIFTY DOLLARS ($750.00) had been paid leaving a balance due of EIGHTEEN THOUSAND TWELVE and 40/100 DOLLARS ($12,012.40) according to the Government assessment. Since the SEVEN HUNDRED FIFTY DOLLARS ($750.00) was paid by Plaintiff McCray, the government did not give Scott credit, thus allowing the government to collect this SEVEN HUNDRED FIFTY DOLLARS ($750.00) more than once.

The Trial Court also failed to give him credit for a THREE THOUSAND, SIX HUNDRED SEVENTY-NINE DOLLAR ($3,679.00) payment by responsible party vice president Martin.

The judgment against Scott is for a sum larger than the amount of unpaid trust funds, according to the govern-

ment's figures. Scott is also ordered to pay interest on money the government conceded is not owed. The statute under which the penalty is assessed, 26 U.S.C. 6672, specifically protects the liable party from the additional negligence penalties applicable under 26 U.S.C. 6653 to wit: "No penalty shall be imposed under section 6653 for any offense to which this section is applicable." Was this error?

The Trial Court ordered Scott to pay more money than it alleges was due the United States. Was this error? The penalty is essentially penal in nature and must therefore be strictly construed. (U.S. v. Hill, 368 F.2d 617 5th Cir.)

The government's position can be summarized by their proposed Admissions of Fact.

They claim unpaid trust funds for

three periods: the first quarter ending 3/31/82, EIGHTEEN THOUSAND, SEVEN HUNDRED SIXTY-TWO and 39/100 DOLLARS ($18,762.39); the second quarter ending 6/30/82, TWENTY FOUR THOUSAND, TWENTY-FOUR and 54/100 DOLLARS ($24,024.54); third quarter ending 9/30/82 FOURTEEN THOUSAND, FIVE HUNDRED EIGHTY-FOUR and 15/100 DOLLARS ($14,584.15) (Tr. pg. 112; pg. 5, Government Proposed Joint Pre-Trial Motion).

The words the government uses are, "The outstanding balance of the total employment owed by Shannon is as follows" (Tr. pg.112), which we presume means the amount of withholding for income tax and social security (F.I.C.A.), excluding matching F.I.C.A. (the matching F.I.C.A., a debt owed by the company but not taken from the employee's salaries, would presumably not be included in the 100%

penalty contemplated by 26 U.S.C. 6672). This totals FIFTY SEVEN THOUSAND, THREE HUNDRED SEVENTY-ONE and 08/100 DOLLARS ($57,371.08).

However, immediately following these figures, the government restates its position saying, "The outstanding trust fund portion of Shannon Advertising's employment tax liability is as follows." (Tr. pg. 112.) The figures are identical except for the second quarter which reads TWENTY-THREE THOUSAND, ONE HUNDRED SIXTY-FOUR and 85/100 DOLLARS ($23,164.85) and totals FIFTY-SIX THOUSAND FIVE HUNDRED ELEVEN and 38/100 DOLLARS ($56,511.38).

Trying to speculate what the government was trying to say, ignoring what may be a typographical error, compounded by two grammatical errors, we can compare the figure of FIFTY-SIX

THOUSAND, FIVE HUNDRED ELEVEN and 40/100 DOLLARS ($56,511.40), (Tr. pg. 4) the amount actually assessed by the government to the second figure of FIFTY-SIX THOUSAND, FIVE HUNDRED ELEVEN and 38/100 DOLLARS ($56,511.38) and presume that this is the correct figure. (The two cent government error is not significant; the EIGHT HUNDRED FIFTY-NINE and 68/100 DOLLARS ($859.68) unexplained discrepancy between the two figures is.)

For purposes of this Petition, it is sufficient to say that the government in the Trial Court was awarded FIFTY-SIX THOUSAND, FIVE HUNDRED ELEVEN and 40/100 DOLLARS ($56,511.40), as being the amount of unpaid trust funds.

However, the government's evidence and allegations impeached this figure.

Mr. McCray paid SEVEN HUNDRED FIFTY DOLLARS ($750.00) towards the first

quarter amount of EIGHTEEN THOUSAND, SEVEN HUNDRED SIXTY-TWO and 39/100 DOLLARS ($18,762.39) (Tr. pg. 113). McCray was given credit for this but none of the other parties were.

Mr. Martin was assessed the entire FIFTY-SIX THOUSAND, FIVE HUNDRED ELEVEN and 40/100 DOLLARS ($56,511.40), but he was given credit for THREE THOUSAND, SIX HUNDRED SEVENTY-NINE DOLLARS ($3,679.00) withheld from his 1984 tax return (Tr. pg. 12), leaving a judgment liability of FIFTY TWO THOUSAND, EIGHT HUNDRED THIRTY-TWO and 40/100 DOLLARS ($52,832.40). Mr. Raines paid nothing and got nothing (Tr. pg. 12).

Scott, Petitioner herein, the only

party who made voluntary payments[5], is credited with those payments of SEVEN THOUSAND, TWO HUNDRED EIGHTY-SIX and 77/100 DOLLARS ($7,286.77) (Docket sheet entry 10/26/89, #38).

If we accept the government's figures as accurate (which they clearly are not), the amounts were paid on the 941 trust fund debt. (The trust funds are typically called 941 funds because they are reported on a Form 941 quarterly.) The liability is essentially civil in nature (Gephort v. U.S. 818 F.2d 469 Cir.6.).

A) McCray - $750.00; first quarter

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[5]We have discounted the motivation of the SEVEN HUNDRED FIFTY DOLLAR ($750.00) "voluntary" payment of McCray as being the minimum necessary to involve the Trial Court's jurisdiction on this issue to file suit for refund. In any event, Scott voluntarily paid nearly ten times that amount.

B) Martin - $3,679.00; quarter unspecified by evidence

C) Scott - $7,286.77; quarter unspecified by evidence

D) Raines - no payments of any kind

We have a total of ELEVEN THOUSAND, SEVEN HUNDRED FIFTEEN and 77/100 DOLLARS ($11,715.77).

The Judgment against Louis James Scott of FORTY-NINE THOUSAND, TWO HUNDRED THIRTY-THREE and 63/100 DOLLARS ($49,233.63) reflects an assessment of FIFTY-SIX THOUSAND FIVE HUNDRED ELEVEN and 40/100 DOLLARS ($56,511.40), less a payment of SEVEN THOUSAND, TWO HUNDRED SEVENTY-SEVEN and 77/100 DOLLARS ($7,277.77) (something unexplained called "fees[6] of NINE DOLLARS ($9.00)" increased the debt).

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[6]There is no provision in the IRS Code allowing for unexplained fees of taxes.

According to the government figures (allowing for a significant range of error), Shannon owed on October 25, 1989, trust funds of FORTY FOUR THOUSAND, SEVEN HUNDRED NINETY-FIVE and 63/100 DOLLARS ($44,795.63).

There is no statute authorizing the government to obtain a judgment in excess of its highest calculated tax due. (Hartman v. U.S.)

This is a violation of Fifth Amendment due process. Scott has been ordered to pay a penalty created by the Court, supported by no statute and no case law.

The Court should remand this case for an adjustment rendering a judgment of no more than FORTY-FOUR THOUSAND, SEVEN HUNDRED NINETY-FIVE and 63/100 DOLLARS ($44,795.63) against Scott, and possibly much less.

QUESTION II: The case presents

important constitutional issues which ought to be resolved by this Court.

The Fifth Circuit opinion and the government concedes that under the 100% penalty authorized by 26 U.S.C. 6672, no more than the tax debt itself may be awarded to the Internal Revenue Service. The IRS may not collect twice. (Emshwiller v. United States 565 F.2d 1042, 8th Cir. (1977). Rehearing en banc denied.) The government is not entitled to more than one satisfaction of the tax liability. (Hartman v. United States 538 F.2d 1336, 8th Cir. 1976.)

An administrative agency may not declare the judgment of a Court to be void. (Enrico, Inc. v. Rice 730 F.2d 1250 (1984) 9th Cir.)

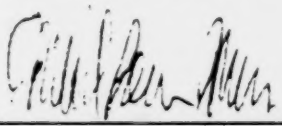
However, in the case at bar, this is specifically the authority given to the IRS. The administrative agency is to

interpret the judgment and collect the amount it deems fair.

CONCLUSION

Certiorari should be granted. A final judgment for money may not be granted absent any statutory authority. The Federal Judiciary should not transfer its power and authority with regard to judgments to an administrative agency.

Respectfully submitted,



Michael Louis Minns
MICHAEL LOUIS MINNS, P.L.C.
10200 Old Katy Road, #101
Houston, Texas 77043
(713) 461-5471
Counsel of Record
(713) 461-5471

APPENDIX

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OPINION OF THE FIFTH CIRCUIT

Michael J. McCRAY, Plaintiff,

v.

UNITED STATES of America
Defendant-Cross-Plaintiff-Appellee,

v.

Louis James SCOTT, a/k/a/ James L. SCOTT,
Cross-Defendant-Appellant.

No. 90-2014

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Sept. 10, 1990.

Chairman of board of directors and vice-president of employer appealed from an order of the United States District Court for the Southern District of Texas, Sim Lake, III, J., which held him 100% liable for penalty arising out of employer's failure to pay federal employee withholding taxes. The Court of Appeals held that: (1) chairman was responsible party who willfully withheld

tax payments, and (2) chairman could secure administrative adjustment for any amount finally paid by joint debtors plus proper interest credit.

Affirmed.

1. Internal Revenue 5205

Chairman of board of directors and vice-president of employer was a "responsible party" who willfully failed to pay federal employee withholding taxes, even though chairman was not corporate officer directly in charge of paying federal taxes, where chairman admitted that he knew taxes had not been paid over and that he used corporate funds to pay other creditors before paying delinquent taxes. 26 U.S.C.A. Section 6672.

2. Internal Revenue 5220

Because Internal Revenue Service (IRS) policy did not permit recovery of more than amount due for federal employee

withholding taxes plus interest on unpaid balance, debtor who claimed that IRS collected more than full amount could secure administrative adjustment for any amount finally paid by joint debtors plus proper interest credit. 26 U.S.C.A. Section 6672

3. Internal Revenue 5204

Persons responsible for payment of federal employee withholding taxes are jointly and severally liable for delinquent taxes. 26 U.S.C.A. Section 6672.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, REAVLEY and KING, Circuit Judges.

PER CURIAM:

I.

Shannon Advertising, a Texas corporation, was owned in equal shares by Louis Scott, Michael McCray, Andrew Martin, and Leonard Raines. Shannon did not pay over its federal employee withholding taxes for the first, second, and third quarters of 1982. Under 26 U.S.C. Section 6672 (1954), the Internal Revenue Service (IRS) assessed each of the four owners a penalty of 100% of the payments due. McCray paid $750 and sued for a refund. The IRS counter-claimed, joining the other owners. McCray and the IRS entered a stipulation of dismissal of his refund claim. The district court entered an agreed judgment between the IRS and Martin stating that Martin is jointly and severally liable for 100% of the penalty. The court also granted the motion of the United States for summary judgment against Scott and Raines,

holding each liable for 100% of the Section 6672 penalty.

II.

[1] Scott raises two issues. He states that he should not be held responsible for paying the penalty because he did not willfully fail to pay over the trust funds as a matter of law. He claims he relied on the other owners, who were in charge of the affairs of the business, and the business's accountants and lawyers to see that the proper taxes were paid. Scott also contends that the district court erred in entering judgment against him for more than the full amount of the penalty now due. He only received credit for the amount which he has paid, yet two of Scott's jointly liable co-defendants have also made partial payments to the IRS. Scott argues that these amounts should have been credited to him

in the court's judgment against him.

The summary judgment proof showed Scott is clearly a person responsible for the payment of the withholding tax. Although Scott was not the corporate officer directly in charge of paying federal taxes, he was chairman of the board of directors and a vice president. He admitted knowing as early as June 1982 that the withheld taxes had not been paid over. After that date, he used corporate funds to pay other creditors before paying the delinquent taxes. This makes him a responsible party who willfully withheld tax payments. Howard v. United States, 711 F.2d 729, 733-736 (5th Cir. 1983).

[2,3] As to the amount of the assessment, the IRS states that it is Service policy to collect only 100% of the amount due from any group of jointly liable persons. Because responsible

persons are jointly and severally liable under Section 6672 for the delinquent taxes, USLife Title Ins. Co. of Dallas v. Harbison, 784 F.2d 1238, 1243 (5th Cir. 1986), IRS procedure is to seek a judgment against each party for the full amount due and later abate the total liability by the accumulation of amounts paid by each responsible party. This abatement does not occur, however, until the "expiration of the statutory period for commencement of a refund suit or, if a refund suit is filed, upon final adjudication of the action." Gens v. United States, 615 F.2d 1335, 1340, 222 Ct. Cl. 407 (1980), cert. denied, 459 U.S. 906, 103 S.Ct. 209, 74 L.Ed.2d 167 (1982) (citation omitted); see USLife 784 F.2d at 1243-44. The IRS argues that in this case the possibility existed at the time of judgment that the owners who had

paid portions of the amount due might sue for a refund. The IRS argument here is the same as that accepted by the court in USLife: .ls1

> Until the limitations period for seeking a refund expires, it cannot be determined with certainty whether the Government will be entitled to retain the funds it has collected. The six-year period for collecting the liabilities assessed against the remaining responsible persons, see 26 U.S.C. Section 6502(a), could expire while the first responsible person's refund claim is still pending. In such circumstances, if the Government were prohibited from pursuing collection activities against the other responsible persons, a successful claim for refund by one of the responsible persons would have the effect of defeating collection of the full amount of the underlying taxes.

784 F.2d at 1244. USLife, however, prefaced that explanation of the IRS's prerogative to pursue each responsible party for the full amount of the penalty due by stating:

> It should be noted that the problem involved here is not present when each responsible person has litigated her liability under Section 6672. When a

> person against whom an assessment has been made contests her liability by instituting a refund suit, the Government joins the other persons against whom Section 6672 assessments have been made. This procedure resolves doubt as to whom the Government may look to for payment of the withholding tax delinquency.

784 F.2d at 1243-44 (citations and footnote omitted). This passage describes the procedural history of the present case. We are told that each responsible person other than Scott now has either reached a binding settlement with the United States or has had a final and unappealed judgment rendered against him. The United States is no longer in danger of losing its right to collect the full amount due. Since Service policy does not permit recovery of more than the amount due plus interest on the unpaid balance, Scott can secure an administrative adjustment for any amount finally paid by joint debtors plus the proper interest credit.

III.

The judgment of the district court against Scott is affirmed without prejudice to the pursuit by Scott of the administrative remedies the IRS assures us are available to adjust the credit he claims are due him as one jointly and severally liable with joint judgment debtors who have finally paid some portion of the common debt.

AFFIRMED.

ORDER ON CROSS DEFENDANT-APPELLANT'S PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2014

MICHAEL J. McCRAY,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant-Cross Plaintiff-
Appellee,

v.

LEWIS J. SCOTT, a/k/a
JAMES L. SCOTT,
Cross Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(October 19, 1990)

Before CLARK, Chief Judge, REAVLEY and KING, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT;

L/S: Charles Clark
Chief Judge

TRIAL COURT DECISION

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL J. MCCRAY,
Plaintiff,

v.

UNITED STATES OF AMERICA) CIVIL NO.
Defendant,) H-86-2800

v.

ANDREW J. MARTIN, LEWIS J. SCOTT, a/k/a JAMES L. SCOTT, LEONARD RAINES,
Additional Defendants on counterclaim

JUDGMENT

Pursuant to the Order signed on this date, it is

ORDERED that judgment be, and hereby is, entered in favor of Defendant United States of America and against additional Defendants Louis J. Scott, a/k/a James L. Scott, in the amount of $49,233.63 in unpaid 100 percent penalty under 26 U.S.C. Section 6672 for unpaid employment taxes of Shannon Advertising for 1st, 2nd,

and 3rd quarters of 1982 ($56,511.40 assessed less payments of $7,286.77 plus fees of $9.00), and Leonard Raines in the amount of $56,511.40 in unpaid 100 percent penalty under 26 U.S.C. Section 6672 for unpaid employment taxes of Shannon Advertising for 1st, 2nd, and 3rd quarters of 1982. Interest shall be alllowed [sic] pursuant to 26 U.S.C. Section 1961(C)(1).

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 25th day of October, 1989.

L/S (Sim Lake)
United States District Judge